

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Review of Foreign Ownership Policies for)	IB Docket No. 11-133
Common Carrier and Aeronautical Radio)	
Licensees und Section 310(b)(4) of the)	
Communications Act of 1934, as Amended)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ respectfully submits these comments in response to the Public Notice issued in the above referenced proceeding.² In reply comments filed in this proceeding, USTelecom urged the Commission to adopt much needed reforms to its current foreign ownership rules.³ Among the issues raised by USTelecom and others were those regarding the Commission’s policies and procedures relating to the treatment of “indirect” foreign interests in a common carrier licensee under section 310(b)(3) of the Communications Act (the Act).⁴

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

² Public Notice, *International Bureau Seeks Further Comment on Foreign Ownership Policies*, DA 12-573 (April 11, 2012) (*Notice*); *see also*, Notice of Proposed Rulemaking, *In the Matter of Review of Foreign Ownership Policies for Common Carrier and Aeronautical Ownership Policies under Section 310(b)(4) of the Communications Act of 1934, as Amended*, (IB Docket 11-133, released August 9, 2011).

³ *See*, Reply Comments of the United States Telecom Association, IB Docket No. 11-133 (submitted January 4, 2012) (*USTelecom Reply Comments*).

⁴ 47 U.S.C. §310(b)(3).

Under the Commission's current framework, indirect, non-controlling foreign investments under section 310(b)(3) are subject to a more stringent standard than controlling interests under section 310(b)(4). As one commenter in the proceeding stated, "it is illogical to treat non-controlling interests more harshly than controlling interests, by interpreting Section 310 to *prohibit* foreign indirectly held *non-controlling* interests over 20 percent, and to *allow* foreign indirectly held *controlling* interests up to 100 percent."⁵ In addition to being illogical, such an approach also is detrimental to the public interest by unnecessarily constraining entry and competition to the detriment of the interests of consumers. Finally, changes to the Commission's approach as outlined in its Notice, would bring its policies into conformance with recent international trade policy agreements between the U.S. and the European Union (EU). Adopting the proposed rule is logical and benefits U.S. consumers and it sets a best-practice example of policy implementation that the U.S. can reference when urging market liberalization from other countries around the world.

I. THE COMMISSION SHOULD IMPROVE ITS FOREIGN OWNERSHIP APPROVAL PROCESS.

USTelecom, and other commenting parties, identified numerous problems arising from the Commission's current application of section 310(b)(3). The Commission's foreign ownership rules treat *non-controlling interests* under Section 310(b)(3) more harshly than *controlling interests* under Section 310(b)(4). When fully enforced,⁶ the

⁵ Comments of AT&T Inc., IB Docket No. 11-133, p. 5 (submitted December 5, 2011) (*AT&T Comments*).

⁶ See e.g., Memorandum Opinion and Order, *VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG*, Transferee, 16 FCC Rcd 9779, ¶¶ 33 – 48 (2001) (whereby the Commission applied Section 310(b)(4) to an indirect, non-controlling interest). Various commenters also note that it has long been the

rules risk penalizing foreign investment in domestic communications entities and conflict with U.S. obligations under current World Trade Organization commitments.⁷

USTelecom and others⁸ recommended addressing the current imbalance between the treatment of approval requests for transactions involving non-controlling interests versus those involving controlling interests by revision of the Commission's 2004 Foreign Ownership Guidelines.⁹ The Commission proposes to address this problem by forbearing under section 10 of the Act from applying section 310(b)(3) governing transactions involving non-controlling foreign interests in common carrier licensees.¹⁰ USTelecom appreciates the Commission rationalizing this aspect of its foreign ownership

Commission's policy to presume that no competitive concerns are raised by indirect investment by entities from World Trade Organization member countries. *See e.g.*, Comments of Verizon, IB Docket No. 11-133, pp. 9 – 12 (submitted December 5, 2011) (*Verizon Comments*); Comments of T-Mobile USA, Inc., IB Docket No. 11-133, p. 3 (submitted December 5, 2011).

⁷ *See e.g.*, *AT&T Comments*, pp. 1 – 2 (stating that the “U.S. WTO commitments in telecommunications require the U.S. to allow the unrestricted indirect ownership of U.S. carriers by natural and juridical persons of WTO Member countries,” and that the Commission should adjust its framework to “make clear to foreign governments that the indirect ownership required to comply with Section 310 does not restrict U.S. market entry by carriers from WTO Member countries.”); *see also*, Reply Comments of CTIA – The Wireless Association®, IB Docket No. 11-133, p. 7 (submitted January 4, 2012) (*CTIA Reply Comments*) (stating that clarification of the Commission's rules “would ensure that the Commission's foreign ownership policies are consistent with U.S. WTO commitments, which do not call for any limits on indirect foreign investment from WTO Members.”).

⁸ *See e.g.*, *USTelecom Reply Comments*, p. 2.

⁹ International Bureau, *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, November 17, 2004, DA 04-3610 (available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-04-3610A2.pdf) (visited May 8, 2012).

¹⁰ *Notice*, pp. 2 – 3.

policy per the recommendation of USTelecom and others,¹¹ and therefore supports the Commission's proposed forbearance approach.

II. FORBEARANCE IS JUSTIFIED TO REMEDY THE IMBALANCE WITH RESPECT TO THE TREATMENT OF CERTAIN FOREIGN INTERESTS IN COMMON CARRIER LICENSEES.

USTelecom agrees that a forbearance approach would satisfy the three requirements of section 10 of the Act.¹² The Commission has the authority under Section 10 of the 1996 Act to forbear from enforcing regulatory requirements where it determines that: (1) enforcement of the regulation at issue is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with the carrier or service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.¹³ Each of these three statutory requirements is satisfied here.

The first prong of the three-part forbearance standard requires the Commission to determine that enforcement of the regulation at issue is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with the carrier or service are just and reasonable and are not unjustly or unreasonably discriminatory.

The Commission's proposal meets the first prong of the forbearance threshold. The

¹¹ See e.g., *USTelecom Reply Comments*, pp. 2 – 3 (stating that the Commission should “promptly adopt streamlined measures relating to foreign investment,” in order to remove administrative barriers that would “result in greater access to foreign capital.”); see also, *Vodafone Group and Verizon ex parte*, IB Docket 11-133, p. 1 (February 21, 2012) (expressing support for “the Commission’s forbearance authority to treat noncontrolling indirect foreign interests in common carrier licensees in the same manner as controlling indirect foreign interests under Section 310(b)(4).”).

¹² *Notice*, p. 3.

¹³ 47 U.S.C. §160(a).

provision at issue governs investment thresholds by foreign interests, and enforcement of the current policy discourages competition that could benefit consumers. Because the Commission has recognized that foreign investment has “proven to be an important source of equity financing for U.S. telecommunications companies, fostering technical innovation, economic growth, and job creation,”¹⁴ its current enforcement of Section 310(b)(3) contravenes the goals of the first prong by substantially discouraging such investment in domestic networks. This in turn results in decreased competition and greater capital costs for carriers,¹⁵ which can result in increased costs for consumers.¹⁶

The Commission’s proposed forbearance approach also satisfies the second prong of Section 10, since enforcement of Section 310(b)(3) is unnecessary for protecting consumers. Specifically, the Commission states that forbearance would apply only where it “finds the particular foreign interests to be consistent with the foreign ownership

¹⁴ Notice of Proposed Rulemaking, *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4) of the Communications Act of 1934 as Amended*, IB Docket No. 11-133, FCC-121 ¶ 2 (Rel. Aug. 9, 2011).

¹⁵ See e.g., *Verizon Comments*, pp. 2 – 4 (noting that the FCC’s current foreign ownership review process discourages foreign investment in a number of ways and disadvantages licensees that are able to secure it. For example, Verizon notes that there now exists a “web of case law with myriad distinctions, conditions, and exceptions,” which in turn “creat[es] uncertainty for foreign investors that can serve to discourage their participation.” *Id.*, p. 3. In addition, Verizon notes that even when foreign investors decide to proceed, the voluminous filing requirements and administrative burdens results in “further disincentive, cost, and delay.” *Id.*

¹⁶ See e.g., *CTIA Reply Comments*, pp. 2 – 4 (stating that “in addition to being a source of additional capital, foreign investors and joint ventures with partners from foreign markets could generate economies of scale that lead to lower per unit prices for network and customer equipment. U.S. wireless providers – the largest of which are not relatively large by global standards – can pass the benefits of global economies of scale on to their U.S. customers.” *Id.*, p. 4).

policies the Commission applies under section 310(b)(4) of the Act.”¹⁷ In other words, because the Commission would be merely replacing one analytical standard with another, Commission oversight still would be present to protect consumers. However, such oversight would not be accompanied by the substantial discouragement of foreign investment in domestic networks present under the current construct, which, as noted above, can harm consumers.

Finally, forbearance by the Commission satisfies the third prong of its analysis, because such action would clearly serve the public interest. As noted previously, the Commission has acknowledged that foreign investment is “an important source of equity financing for U.S. telecommunications companies, fostering technical innovation, economic growth, and job creation.”¹⁸ As discussed above, this foreign investment benefits competition and consumers thereby ensuring that forbearance is in the public interest. In fact, a report last June from the Executive Office of the President, Council of Economic Advisers, found that the companies behind such foreign investment play an important role in the U.S. economy, since they “build plants and other facilities or provide additional capital to businesses that already operate locally in the United

¹⁷ Notice, p. 3.

¹⁸ Notice of Proposed Rulemaking, *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4) of the Communications Act of 1934 as Amended*, IB Docket No. 11-133, FCC-121 ¶ 2 (Rel. Aug. 9, 2011).

States.”¹⁹ These same companies make “substantial investments in capital equipment and R&D and tend to hire and train skilled workers and pay excellent wages.”²⁰

III. THE COMMISSION’S POLICIES SHOULD CONFORM TO U.S. INTERNATIONAL OBLIGATIONS.

Although applicable to domestic common carriers, the Commission’s policies and procedures regarding the treatment of direct and indirect foreign interests in common carrier licensees have global implications. It is therefore important that Commission policies impacting foreign investment conform to U.S. obligations in the international context.

In this regard, adoption of the Commission’s proposal contained in the Notice to rationalize its policy governing approval of transactions involving foreign investment in domestic common carriers is consistent with, and would appropriately support, the agreement between the United States and the EU regarding Shared Principles for International Investment (Shared Principles)²¹ that was recently announced by the U.S. Department of State and the United States Trade Representative (USTR).²² Among other things, the Shared Principles embody a number of mutual core values, including a commitment to open and non-discriminatory investment policies, a level competitive

¹⁹ Report, *U.S. Inbound Foreign Direct Investment*, Executive Office of the President, Council of Economic Advisers, p. 1 (June 2011) (available at: http://www.whitehouse.gov/sites/default/files/microsites/cea_fdi_report.pdf) (visited May 8, 2012).

²⁰ *Id.*, p. 2.

²¹ See, Office of the United States Trade Representative website (available at: http://www.ustr.gov/webfm_send/3337) (visited May 1, 2012).

²² Joint Statement Issued by the U.S. Department of State and the United States Trade Representative, April 10, 2012 (available at: <http://www.state.gov/r/pa/prs/ps/2012/04/187645.htm>) (visited May 1, 2012).

playing field, strong protections for investors and their investments and strong rules on transparency and public participation.

Earlier this month, President Obama issued an Executive Order to promote international regulatory cooperation and encourage federal agencies to find ways to reduce regulatory inconsistencies with the nation's trading partners.²³ The Executive Order notes that regulatory consistency between domestic and international laws can be an important means of promoting economic growth, innovation and job creation.²⁴ Adoption of the Commission's proposed forbearance approach would better harmonize the U.S. approach with that of the EU with respect to transactions involving non-controlling interests.

According to the USTR, the U.S. economic relationship with the EU is the largest and most complex in the world, generating trade flows of about \$3.6 billion a day, and creating 7.1 million jobs due to the transatlantic investment. As noted by the USTR, this "enormous volume of transatlantic trade and investment promotes economic prosperity on both sides of the Atlantic."²⁵ To ensure the continued viability of this economic relationship, and to demonstrate a strong and immediate commitment to fully implement the agreed set of policy principles, it is imperative that the Commission improve its foreign ownership approval process.

²³ Executive Order, *Promoting International Regulatory Cooperation*, May 1, 2012 (available at: <http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>) (visited May 8, 2012).

²⁴ *Id.*

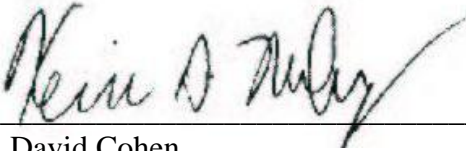
²⁵ See, USTR European Union website, (available at: <http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union>) (visited May 1, 2012).

IV. CONCLUSION

USTelecom supports the Commission's proposal to forbear under section 10 of the Act from applying section 310(b)(3) to certain foreign interests in common carrier licensees as an important step towards reforming its foreign ownership rules for the benefit of consumers.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: _____

David Cohen
Kevin Rupy
Its Attorneys
607 14th Street, NW, Suite 400
Washington, D.C. 20005
202-326-7300

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